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Supreme Court Of The United States

October Term, 1989.

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

ROBERT HARMON, Director, Missouri Department of Health, et al. ,

Respondents,

v.

THAD C. MCCANSE, Guardian Ad Litum,

Respondent.

ON WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

BRIEF OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VIRGINIA, WEST VIRGINIA AND WISCONSIN *AMICI CURIAE,* IN SUPPORT OF RESPONDENTS, ROBERT HARMON *ET AL.*

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INTEREST OF AMICI CURIAE[1]

This case presents important issues affecting the fundamental right to life of all Americans. The American legal tradition has placed the preservation, protection and prolongation of life at the highest level — to the point of "sacredness." The right to life is

[1] Counsel of record for all parties have consented to the filing of this brief and, pursuant to Rule 36, letters of consent have been filed with the Clerk.

enshrined not only in the Declaration of Independence,[2] but in the Bill of Rights in the Fifth Amendment,[3] as well as in the Fourteenth Amendment.[4] The petitioners would drastically reduce the inherent value of this basic American right. The Rutherford Institute is opposed to such a denigration of human life and believes that the decision of the Missouri Supreme Court should be forcefully affirmed as fully consistent with the mandates of the both the Constitution and our Western tradition.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. The Rutherford Institute and its affiliated state chapters undertake to assist litigants and to participate in significant cases relating to the protection and safeguarding of human life. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

This case raises profound philosophical, religious, medical and sociological questions. The range of disparate views, interests and partisan considerations on the "right-to-die" issue, as well as the many varied state court precedents, tempt a comprehensive approach to decision and prompt this Court to impart a broad regime of rules to this "emerging" area of law. Prudence cautions a more deliberate course. Indeed, the fact that this is an emerging and difficult area of the law, with many countervailing interests, is sufficient reason for this Court to avoid broad and sweeping pronouncements and to limit decision to the specific issues presented by this case. Moreover, it is well to recognize the

[2] As Thomas Jefferson wrote in the Declaration of Independence: "We hold these truths to be self-evident, that all men are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." C. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 187-93 (1922).

[3] "[No person shall] be deprived of life, liberty, or property, without due process of law...."

[4] "[No State shall] deprive any person of life, liberty or property, without due process of law...."

appropriate roles of the coordinate branches of government in addressing the problem. An appropriate balance should accommodate what each of the executive, the legislative and the judicial branches might contribute to resolve the social dilemmas presented by these types of cases.

The question posed by the case at bar is relatively narrow: what agency, if any, is authorized to decide, and under what circumstances, whether an incompetent person can be deprived of food and water so as to cause certain death by thirst and starvation? Put another way, (1) does the right to privacy recognized in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) and *Roe* v. *Wade*, 410 U.S. 113 (1973) include a right to discontinue food and water where this action would result in certain death by thirst and starvation and (2) does the Constitution require that such a right vest with an incompetent's guardian where the holder of that right, though formerly competent, is now incompetent to exercise it?

In *Griswold*, *Roe* v. *Wade*, *Bowers* v. *Hardwick*[5] and numerous other decisions, this Court has followed the principle that no right can be deemed "fundamental" unless it is rooted in the history and traditions of our society and is otherwise basic to our civil and political institutions. The right to privacy has thus been limited by this Court and has been sparingly extended only to certain areas because they are basic to our civil and political institutions and have historically and traditionally been considered beyond the proper scope of government regulations.

The petitioners argue that the right to refuse medical treatment is deeply rooted in this nation's history and thus has the requisite characteristics of a fundamental right. From this proposition they conclude, in what can only be described as an analytical leap, that this right also allows individuals to refuse artificially administered food and water where death is the only motivation for such refusal. And the petitioners make yet another "analytical" leap to permit a surrogate —- the "guardian" —-to exercise an incompetent's privacy right to accomplish the same end, even in the absence of clear and convincing evidence or, for that matter,

[5] 478 U. S. 186 (1986).

in many cases, any evidence whatsoever, as to how the incompetent might exercise the purported right.

In fact, the historical predicate supports a contrary position. To seek death for no reason other than that life is simply no longer worth living is suicide. And to withdraw food and water from a persistently vegetative patient is indistinguishable from euthanasia. Both actions constitute the taking of a human life.

Neither suicide nor euthanasia can be considered a fundamental right. Anglo-American law and tradition have wholly condemned such practices through criminal prohibition. Moreover, the ethical integrity of the medical profession, which has historically been dedicated to the preservation and prolongation of life, would be gravely undermined by the legitimization of euthanasia and suicide. And to "privatize" decision-making would not only devalue our democratic tradition and ignore societal institutions that are fully capable of drawing proper distinctions in this area, it would cheapen the right to life protected by the Fourteenth Amendment and put the "abnormal" infant, the infirm, the poor and the elderly at great risk. This Court should, therefore, refuse to extend the right to privacy to permit withdrawal of food and water from an incompetent, whether at the direction of the courts or at the behest of third party intervenors.

Assuming that the Constitution may guarantee individuals some measure of "liberty" in discontinuing life sustaining procedures, it nevertheless does not restrict government from reasonably regulating how, and under what circumstances, such procedures can or should be withdrawn, particularly where the patient is incompetent and cannot independently assert this alleged right. However, if this Court should declare that the power to terminate the life of an incompetent ward vests without qualification in the guardian, the floodgates of legalized extermination of infants and other incompetents will inexorably open. The very survival of "abnormal" newborns, the elderly, and other individuals suffering from serious mental disabilities will frequently and routinely be cast to the uncertain and standardless discretion of judges or guardians who will substitute their own judgement as to whether the lives of their charges are devoid of value. Such a decision will

seriously threaten those individuals' right to life guaranteed under the Fourteenth Amendment of the Constitution. And it will fail to account for the important societal interests in determining the means and procedures for preserving, protecting and prolonging human life, in discouraging suicide and euthanasia as the unlawful taking of life, and in advancing medical standards and ethics that seek to preserve life and encourage life sustaining treatment.

ARGUMENT

I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED OUTSIDE THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY AND THE WITHDRAWAL OF BASIC LIFE ESSENTIALS —- FOOD AND WATER —- BY A THIRD PARTY CANNOT CONCEIVABLY BE PROTECTED BY THAT RIGHT.

A. The Narrow Range of Fundamental Rights.

This Court has previously recognized certain fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. The Court has been highly selective when determining what values are to be placed beyond the reach of the democratic process, limiting them only to those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934), or are "implicit in the concept of well ordered liberty." *Palko* v. *State of Connecticut*, 302 U.S. 319, 325 (1937). *See Rochin* v. *People of California*, 342 U.S. 165, 169 (1952) (quoting *Snyder* and *Palko*). When such rights are burdened by state action, a necessary relationship between the action and a compelling state interest is required in order for the action to be upheld. *Griswold*, 381 U.S. at 491.

In order for any right to be considered fundamental and therefore eligible for protection under the privacy guarantee, it must be rooted in the history of our society and be basic to our civil

and political institutions. In *Palko* v. *State of Connecticut*, this Court suggested the search for rights protected through the Fourteenth Amendment should focus on "'the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Palko*, 302 U.S. at 328. More recently, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court addressed the question of fundamental rights in a criminal procedure context. In concluding that the right to jury trial is fundamental, the Court explored the historical role of such trials in the "Anglo-American regime of ordered liberty." *Id.* at 149 n.14.

In *Griswold* v. *Connecticut*, where the right to privacy was formally announced, this Court stated: "We deal with a right older than the Bill of Rights—older than our political parties, older than our school system." *Id.* at 486. In a concurring opinion, Justices Goldberg, Brennan, and Chief Justice Warren expressed reservation that "'fundamental rights must be derived from the traditions and [collective] conscience of our people.'" *Id.* at 493 (citation omitted). These Justices went on to reemphasize the basic position of "the rights to marital privacy and to marry and raise a family" in our society and that the marriage and family relationship are "as old and fundamental as our entire civilization." *Id.* at 495-96.

Again, in *Roe v. Wade*, 410 U.S. 113 (1973), this Court committed itself to historical analysis in determining what rights are fundamental and therefore protected by the right to privacy. After an extensive, though notably incomplete and skewed, survey of the medical and legal history of abortion, the Court concluded that restrictive criminal abortion laws were "of relatively recent vintage" *(id.* at 129), and that Anglo-American law had generally treated abortion with less severity than the state statutes then in force. An essential premise in the Court's reasoning was its conclusion regarding the legal and medical history of abortion. Justice Rehnquist's dissent was based, at least in part, on his view that the Court had misread history. His conclusion was nevertheless historically grounded: "the asserted right to abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 174 (Rehnquist, J., dissenting) (citation omitted).

In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), this Court again indicated its obedience to history in the development of the right of privacy. The Court was faced with a city housing ordinance which had the effect of forbidding a grandmother from living in the same home with her son and two grandsons. In a plurality opinion authored by Justice Powell, the Court concluded that the ordinance violated the Due Process Clause of the Fourteenth Amendment. The decision was based on the view that the family, both nuclear and extended, in American society was "deeply rooted in this Nation's history and tradition." *Id.* at 503. The plurality opinion emphasized that its "approach [was] grounded in history," *Id.* at 503 n.12, and that "arbitrary lines" need not be drawn where there is "careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" *Id.* at 502-03, *quoting Griswold*, 381 U.S. at 501 (Harlan, J., concurring). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984).

This Court recently recognized that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Without the constraint and guidance of history in discerning the fundamental rights protected against the state, judges would be free to legislate their own preferences at the expense of those of the American people as expressed through their elected representatives. In *Bowers*, therefore, the longstanding history and tradition of legislation prohibiting sodomy throughout the states was deemed to be strong evidence that homosexual sodomy was conduct that could hardly be deemed a "fundamental" freedom under the Due Process Clause. And the Court has frequently warned of the dangers inherent in judicial declarations of "fundamental rights." In *Griswold*, itself, the Court stated: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482. In *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan expressed his concern that fundamental rights analysis under the Due Process Clause of the Fourteenth Amendment contained poten-

tial for judicial abuse. However, he concluded that such abuse would be prevented by respect for "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke." *Id.* at 542, *quoted in Moore*, 431 U.S. at 501. Such careful respect for the teachings of history is necessary in order for appropriate limits to be placed on substantive due process and to recognize the powers and duties of the coordinate branches of government. *Moore*, 431 U.S. at 503.

B. The Failure of Analysis in "Right-to-Die" Cases.

In Re Quinlan, 355 A.2d 647 (1976), is the seminal, and frequently cited as the leading, case in which a court authorized the removal of life support equipment on privacy grounds. However, the *Quinlan* court made no attempt to explore the history and traditions of Western society which might buttress the view that the removal of life support involves a fundamental right. Subsequent "right–to–die" cases merely rely on the *Quinlan* precedent and add little in the way of reasoned analysis on the right to privacy issue. To the extent these courts adopted the *Quinlan* court's holding without engaging in the essential historical analysis, these cases are similarly flawed. And the one fact that advocates of both *pro* and *con* on the "right–to–die" issue agree is that "[t]he so-called 'right to die' cases that involve incompetent patients suffer from a serious internal conflict: their legal standards only rarely justify their results." Rhoden, *Litigating Life and Death*, 102 Harv. L. Rev. 375 (1988).[6]

In its decisions dealing with the right of privacy, this Court has been careful, as previously explained, to limit the scope of that right to matters which can truly be characterized as fundamental in American history and tradition or implicit in the concept of

[6] Professor Rhoden's article favors family control over the "right–to–die". Although the article contains a penetrating critique of the failure of judicial standards in "right–to–die" cases, it is remarkably deficient in two distinctly important areas: (1) the role of the coordinate branches of government in fashioning societal standards in this area and (2) differentiation between (a) withdrawal of basic nourishment without which a certain and cruel death would result and (b) withdrawal of therapeutic medical treatment aimed at rectifying the loss of bodily functions without which a person may or may not otherwise die.

ordered liberty. The Court has refused consistently to extend heightened protection to conduct which does not meet these standards. Thus, in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 20 (1973), the Court refused to rule that education involved a "fundamental" right, noting that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." And in *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), this Court recognized that the right of privacy does not protect access by consenting adults to obscene materials outside the home. This Court said: "Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right implicit in the concept of ordered liberty to watch obscene movies in places of public accommodation." *Id.* at 65-66. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court refused to expand the right to privacy to protect homosexual sodomy between consenting adults. The Court warned against expanding the reach of the Fourteenth Amendment Due Process Clause by "redefining the category of rights deemed to be fundamental." *Id.* at 194-95. Under this analysis, it is not sufficient to find a right of privacy generally in all matters personal, rather, it is necessary that the activity seeking protection under the right to privacy itself be fundamental.

In *In Re Quinlan*, 355 A.2d 647 (1976), the New Jersey Supreme Court devoted scarcely a page of analysis in support of its conclusion that the right to privacy was "*presumably* broad enough to encompass a patient's decision to decline medical treatment...." *Id.* at 663 (emphasis added). The presumption that the mere existence of a right to privacy in the Constitution justifies it encompassing all matters dealing with one's personal autonomy is the identical faulty syllogism which this Court rejected in *Bowers v. Hardwick*. In *Bowers*, this Court noted that the respondents failed to ground their right to engage in homosexual sodomy in the traditions and history of our laws and institutions. The Court found this defect fatal to their claim that such activity was a fundamental right protected under the Fourteenth Amendment.

C. The Termination of Food and Water Cannot Reasonably Be Characterized As a Fundamental Right.

As observed by several courts and legal commentators, the "right–to–die" is an issue where "euphemisms readily find their way to the fore, perhaps to soften the reality of what is at stake." *Cruzan*, 760 S.W.2d at 412. Unfortunately, much of the case law in the area has resulted in standards that are the "bioethical equivalent of squaring the circle."[7] "Even a superficial analysis reveals that legal discourse about timing-of-death decisions quickly degenerates into incoherent babbling that lacks logic, consistency, or any ability to guide behavior." Ikuta, *Dying at the Right Time: A Critical Legal Theory Approach to Timing-of-Death Issues*, 5 Issues in Law and Medicine, No. 1, 3 (1989). In most instances, "case law has created fictions to avoid affronting [traditionally and historically] accepted norms." Alexander, *Death by Directive*, 28 Santa Clara L. Rev. 67, 82 (1988). Of course, this Court should not permit legal fiction to dictate constitutional principles.

As will be demonstrated, neither suicide nor euthanasia has an historical or traditional foundation in Anglo-American law. Since this proposition cannot be adequately refuted, and petitioners make no attempt to refute it, a legal fiction must be employed to obscure the fact that euthanasia, suicide, and the killing of a human life is essentially what is at issue when artificial hydration and nutrition is refused or withdrawn to effect one's own death or that of a ward in his charge. Only through the use of this legal "mask" can one tenably maintain that there exists a fundamental right to undertake such conduct.

Artificial hydration and nutrition did not exist in early Anglo-American law and thus obviously cannot provide an unmistakable historical predicate for the existence of a fundamental right to refuse such procedures. Accordingly, petitioners must resort to the analogy that such a liberty is included in the historical and traditional right to refuse medical treatment. In so doing,

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[7] Arras, *Quality of Life in Neonatal Ethics: Beyond Denial and Evasion* in *Ethical Issues at the Outset of Life* at 166 (M. Benjamin & M. Weil eds. 1987), cited in Rhoden, *supra* page 8, at 386.

petitioners misapprehend the nature of this liberty found in common law and early American law.

The cases or theories petitioners marshall in support of this alleged fundamental right are of three types: (1) those in which an underlying illness appeared to be terminal and thus afforded no medical solution other than extraordinary medical measures to preserve life or otherwise cure the underlying bodily defect[8], (2) those where the patient neither sought nor desired death, but where the risk or certainty of death was tolerated to secure some higher principle, such as faithfulness to one's religious convictions,[9] and (3) those involving informed consent requirements where death was unlikely to result from the refusal of medical treatment.[10]

The present case cannot be included in any of the foregoing categories. This is not a case where removal of life sustaining procedures will merely hasten death. Nancy Cruzan is not terminally ill. *Cruzan* 760 S.W.2d at 412. She has a normal life expectancy for a person her age. *Id.* The guardians seek no goal but her death.

The guardians also harbor no principled religious or philosophical objection to artificial hydration and nutrition as a medical technique and presumably would welcome such procedures were Nancy's death available through some alternate means. Accordingly, this case bears no resemblance to the group of cases where medical treatment was refused on religious grounds. In those cases, death was not the goal and in fact was not even desired. Freedom to be faithful to one's religious convictions even at the risk of death was the fundamental liberty advanced in these cases—not, as the petitioners maintain, freedom to refuse life sustaining procedures in order to effect one's death when one found life no longer worth living.

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[8] *See, e.g., In re Quinlan*, 355 A.2d 647, *cert. den.*, 429 U. S. 922 (1976); *Eichner* v. *Dillon*, 420 N. E. 2d 64, *cert. den.*, 454 U. S. 858 (1981).

[9] *See the cases cited in footnote 17 of the Missouri Supreme Court majority opinion in this case, Cruzan by Cruzan* v. *Harmon*, 760 S. W.2d 408, 422 (Mo. En Banc 1988); but *cf* In re Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D. C. Cir. 1964) (Opinion of Wright, J.).

[10] *See Brief for Petitioners*, pp. 18-20.

The cases involving informed consent are also inapposite. They largely involve personal injury actions against medical care providers rather than the vindication of some death right against state encroachment. Petitioners' reliance on these cases as precedent for a fundamental right to refuse artificially administered food and water in one's quest for death is therefore misplaced.

Apart from the relative recency of these cases, and the fact that they are only marginally relevant on the facts of this case, none of the legal doctrines reflected in these cases demonstrate longstanding principles that are rooted and grounded in our tradition or history or otherwise implicit in the concept of ordered liberty. To the contrary, they largely reflect the struggles of the parties in attempting to resolve what are in many instances broad social policy dilemmas presented by the technological age.

On the other hand is the traditional and historical proscription of suicide and euthanasia which pervades Anglo-American law and can be traced back to the teachings of the Christian Church and early English common law and statutory law.[11] Suicide is "the willful and voluntary act of a person who understands the physical nature of the act, and intends by it to accomplish the result of self termination...." 40A Words and Phrases, "Suicide" 143 (1981). Suicide "is the denial that self-preservation is the first law of life. No one who commits suicide is in that moment of normal mind."[12] Suicide is still suicide even if one believes that one's life is no longer worth living (or, where one's suicide is "rational", if the alternate term is preferable) and even if one can get others to agree on this. Similarly, euthanasia is the "putting to death persons suffering [from an] incurrable or distressing disease as an act of mercy." Black's Law Dictionary 497 (5th ed. 1979). As with suicide, its

[11] Although suicide was never a legal crime in the Greek or Roman world, it was considered an act against the state. Aristotle said: "The suicide commits injustice, but against whom? It seems to be against the state rather than against himself... This is why the state exacts a penalty; suicide is punished by certain marks of dishonor, as being an offense against the state." Aristotle, *Nicomachean Ethics*, 5.11.3, 1138a 10, *quoted in*, W. Barclay, *The Ten Commandments for Today* 83 (1973).

[12] W. Barclay, *supra* note 11, at 85.

character does not change with the strength of the underlying motivation.

Establishing the limits of suicide with reference to right-to-die issues and cases has been heavily influenced by traditional Judeo-Christian and philosophical thought. Because of this, "[t]he starting point of a court's analysis is often the sanctity of life and the duty to preserve it. Judeo-Christian thought traditionally places a preeminent value on human life. In traditional Jewish thought, the duty to preserve life is so strong that an individual may not refuse treatment for disease, lest by doing so he prematurely ends his life."[13] The first century Jewish historian Josephus, likewise, argued against suicide because "the soul is depositum received from God, so that a man acts wickedly in casting it from his body." 8 *The Encyclopedia of Philosophy* 43 (1967).[14]

The Christian Church, while recognizing compassion for the loneliness and lostness that leads to suicide,[15] nevertheless has consistently taught against it.[16] St. Augustine condemned suicide as a violation of God's gift of life. O. Russell, *Freedom to Die: Moral and Legal Aspects of Euthanasia* 77 (1976) [hereinafter *Freedom to Die*]. In the thirteenth century, St. Thomas Aquinas described suicide as "the most fatal of sins because it cannot be

[13] Morgan & Harty-Golder, *Constitutional Development of Judicial Criteria in Right to Die Cases: From Brain Dead to Persistent Vegetative State*, 28 Wake Forest L. Rev. 721, 740 (1988)(footnotes omitted).

[14] The Jewish tradition includes an exception for suicide and euthanasia in laying down one's life for his or her faith and people, best exemplified by the seige of Masada where the Jewish garrison slew their wives and children and killed themselves rather than permit them to be dishonored and brought into slavery. W. Barclay, *supra* note 11, at 82.

[15] W. Barclay, *supra* note 11, at 86.

[16] "The legal proof texts [for both Judaism and Christianity in] forbidding [suicide] were Genesis 9:5: "For your lifeblood I will surely require a reckoning; Deuteronomy 4:9: "only take heed, and keep your soul diligently"; this commandment itself, and Job 2:9, 10 where Job in face of his disasters indignantly refuses a suggestion to put an end to his own life." Job's wife had suggested that he "curse God and die." W. Barclay, *supra* note 11, at 81. There are at least 5 cases of men taking their own lives in the Old Testament and 1 in the New Testament (Judas Iscariot). *Id.*

repented on." St. Thomas Aquinas, *Summa Theologica*. Suicide became a cardinal sin. *Freedom to Die*, *supra* at 77.

Suicide was a felony at common law. Beschle, *Autonomous Decision Making and Social Choice: Examining the "Right to Die"*, 77 Ky. L.J. 319, 323 (1989). It was considered both a spiritual offense and an offense against the King who, it was deemed, "hath an interest in the preservation of all his subjects...." W. Blackstone, 4 *Commentaries on the Laws of England* 189 (1967 reprint). The penalty was to require forfeiture of the property of those who succeeded at committing suicide. *Id.* at 190. Since the successful suicide is not otherwise amenable to punishment, one must also look to the penalties for attempted suicide and aiding and abetting suicide to discover the high degree of moral turpitude which Anglo-American society attached to suicide. At common law, those who attempted suicide along with their conspirators were severely punished. *Freedom to Die*, *supra* at 77. Assisting in another's suicide was a serious crime. Beschle, *supra* at 323; *see McMahon v. State*, 53 So. 89, 90-91 (Ala. 1910). Any type of "mercy killing" carried the same charge as homicide. Beschle, *supra* at 323. The laws of England regarded suicide and euthanasia as criminal well into the twentieth century. *Freedom to Die* at 79.

Early American law maintained a similar posture. One state court stated: "If a person, knowing [of the] suicidal intent of another, at [the] suicide's request prepares and places poison in [the] mouth of [the] suicide, he is regarded as administering poison, and in case of death is guilty of murder." *Aven v. State*, 277 S.W. 1080 (Tex. Crim. 1925). Numerous court decisions from various states overwhelmingly reaffirm this view. *See, e.g.*, *People v. Roberts*, 178 N.W. 690 (Mich. 1920); *Burnette v. People*, 68 N.E. 505 (Ill. 1903); *Sanders v. State*, 112 S.W. 68 (Tex. Crim. 1908).

Euthanasia has likewise been disparaged in our tradition. One contemporary religious commentator has called it "legally indefensible, practically impossible, morally wrong, and theologically unjustifiable."[17] At common law, it has been punished as aiding and abetting suicide. And in practice, it contravenes the

[17] W. Barclay, *supra* note 11, at 80.

traditional ethic of medicine as a healing art. "Killing of patients by physicians is not a proper topic for value-free discussion. The prohibition against killing is a *fundamental* rule in medicine as elsewhere, and it is a rule we tamper with only at enormous peril for patients, physicians, and society."[18]

Accordingly, the state of American law and tradition regarding suicide and euthanasia was unambiguously hostile "[a]nd there is little reason to believe that this legal attitude toward death was not generally approved." Beschle, *supra* page 14, at 323. During the twentieth century, various legislative efforts seeking to legalize euthanasia were rejected both in the United States and in England. *Id.* at 323-24.

As this historical exegesis demonstrates, neither suicide nor euthanasia can be regarded as a fundamental right grounded in the history and tradition of our society. Petitioners must resort to one or more of the legal fictions alluded to earlier in order to mask the fact that the activity which they wish this Court to declare a fundamental right is nothing less than euthanasia (if guardians are given power to exercise the choice) or suicide (if guardians are permitted to exercise "substituted judgement" for Nancy). In either event, the conduct involves the killing of a human life.

Petitioners insist that the removal of an individual's artificial hydration and nutrition motivated solely to effect that individual's death does not constitute suicide or euthanasia because death is actually the result of some underlying condition. Brief for Petitioner for Writ of Certiorari at 12. Petitioners contend they merely wish to "allow nature to take its course." *Id.* (quoting *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. banc 1987). This mask of "medical determinism" allows moral responsibility to be shifted by casting patients as "passive victims of their [underlying] illness. They do not choose to die; death overtakes them. Their physicians do nothing to help them die. Death overwhelms them, too." Alexander, *supra* page 10, at 82. This legal fiction was adopted by a California court in *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1146 (1986), and *Bartling v. Superior Court*, 163 Cal. App.

[18] Siegler, *The A.M.A. Euthanasia Fiasco*, N. Y. Times, Feb. 1, 1988, at 23, col.1, *cited in* Ikuta, *supra* page 10, at 24-25.

3d. 186(1984). The California courts' endorsement of this fiction, under the euphemism of "death with dignity"[19] and its accompanying arguments should not be seriously entertained.

"Blaming the underlying disease rather than the act of life-support removal is romantic, but illogical. A person who removed a feeding tube from a recovering patient temporarily dependent on it would have a difficult time persuading anyone that the resulting death was caused by the underlying illness not by the removal of the tube....To make a case depend on whether the person wishes to die as opposed to having necessary life support removed is too transparent to be useful and too insensitive to be ethical." Alexander, *supra* page 10, at 83. Should this Court accept and protect an individual's decision to deprive himself of food and water, it seems doubtful that the Court can long permit restrictions on more active, and in some ways, more humane, lethal alternatives.

II. ASSUMING, FOR THE PURPOSES OF ARGUMENT, THAT THE RIGHT TO PRIVACY ENCOMPASSES AN INDIVIDUAL'S CHOICE TO DISCONTINUE FOOD AND WATER, THE STATE'S COUNTERVAILING INTEREST IN PRESERVING LIFE IS SUFFICIENT TO OVERCOME THIS RIGHT AND THE EFFICACY OF THIS COUNTERVAILING INTEREST IS NOT DEPENDENT ON QUALITY OF LIFE CONSIDERATIONS.

Petitioners do not presently contest that a state has sufficiently compelling interests in protecting life to overcome any individual privacy rights with respect to a healthy individual. It may seem reasonable to some that these interests should be substan-

[19] The ignominious first use of the "death with dignity" slogan, "as far as we know, [was] in a book published in Germany in 1920 by Karl Binding and Alfred Hoche: *The Release of the Destruction of Life Devoid of Value*. There is no doubt what the authors meant by the term. They made it the motto of the movement to legalize the killing of a person who had 'the right to the complete relief of an unbearable life.' *But*, we have to ask, *'unbearable' by whose definition*?" C. Koop and F. Schaeffer, *Whatever Happened To The Human Race?* 55 (1983 rev. ed.) (emphasis added).

tially discounted for individuals who suffer from terminal illnesses or injuries. Since death must come at some point in everyone's life, some believe that merely altering the time of death by an insubstantial period will not do great injury to the state's interests. This is not to say that their life is less valuable. On the contrary, there may simply be less life remaining to which society can attribute sufficient value to protect or preserve.

In contrast, great mischief lies in the notion that the "quality" of one's life limits the state's ability to stop the voluntary starvation and dehydration of an individual who wishes to die. How long could this Court accord fundamental right protection to a severely brain damaged individual's choice to die before it would be asked on equal protection grounds to extend such rights to less severely afflicted individuals and finally, to those who suffer no affliction whatsoever, but nonetheless wish to die? This, of course, would be the judicially authorized killing of human life. As the *Cruzan* court observed, "once prognosis becomes irrelevant,...the judicial approval of suicide [must follow]". *Cruzan*, 760 S.W.2d at 422 (citing Tribe, *American Constitutional Law* 1366 (2d ed. 1988)).

The *Quinlan* court subtly moved the focus of the state's countervailing interest from the patient's prognosis or the quantity of life remaining to the quality of the remaining life. The Missouri Supreme Court rejected this view holding that the state's interest in preserving life was unaffected by quality of life considerations. To argue that a non-terminal, but nevertheless brain injured, individual has a right to refuse food and water, one must presume that the state's interest diminishes with the quality of that individual's life. The *Cruzan* court recognized that this is nothing more than a thinly disguised assertion that such persons are of lesser value. Since there was no basis in this nation's history or tradition for this presumption, the *Cruzan* court did not feel compelled to adopt it.

Judge Blackmar, in dissent, claimed that quality of life considerations *are* relevant and appropriate for determining the efficacy of the state's countervailing interest in preserving life. This colloquy is somewhat reminiscent of this Court's assertion in *Roe v. Wade*, that the state's interest in pre-viable unborn life in

not compelling, 410 U.S. at 165, and this same Court's counter-assertion in *Webster v. Reproductive Health Services*, that the state's interest in unborn life is compelling throughout pregnancy. 109 S.Ct. 3040, 3057 (1989) *quoting Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting)). The nature of a state's interest, compelling or otherwise, in protecting life, be it unborn or vegetative, cannot be empirically determined. It is based on moral grounds and derived from the inalienable right to life —- the precondition for all human rights. The paramount value assigned to life by our society has been unequivocally recognized in the founding documents of our Republic —- the Declaration of Independence, the Fifth Amendment of the Bill of Rights and the Fourteen Amendment implementing Emancipation. The latter two Amendments require Due Process before life can be extinguished through state action.

Although it is certainly within the role of this Court to protect life by determining what process is "due" to extinguish the life of the severely brain injured, it is hardly appropriate for the judicial branch of government on constitutional grounds to promulgate a regime of rules under which life can be taken. That role is more legislative in nature. Any attempt by the courts to determine the nature of the state's countervailing interests in preserving the life of those who are severely brain injured necessarily deteriorates to "reason by assertion" as it did in the context of unborn life. The proper value which society should place on permanently vegetative individuals and the procedures to extinguish their lives is a question upon which the courts should limit their role to review rather than promulgation. The question is inherently political, not juridical. This is particularly true since "there is no consensus in our society about how the value of life is affected by the loss of higher brain function." Tribe, *supra* page 17, at 1369; *see also id.*, n.34. "[D]eference to the legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that without careful statutory guidelines and gradually evolving procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood." *Id.* at 1370-71.

The Missouri legislature has responded to the ethical dilemma posed by advanced technology with a Living Will statute. Mo.

Ann. Stat. §§ 459.010-459.025 (Vermont Supp. 1987). Although not directly at issue in this case, the statute balances the privacy interests of individuals against the countervailing interests of the state and enumerates the situations where individual preferences should control and those where the state's interest in life should control. The statute favors the individual's choice to refuse life sustaining procedures where the patient's underlying affliction is *incurable* and where death is *imminent* irrespective of whether these procedures are implemented. § 459.010(3). The statute *excludes* the removal of artificial hydration and nutrition as well as pain relievers from among the procedures that can be removed by the patient's directive, presumably because this would result in inhumane suffering for the dying patient. *Id.* Although the statute is not directly at issue here, it is nonetheless useful as an expression of the collective values of the people of Missouri as they bear on the strong and competing interests represented in Nancy Cruzan's case or in any other case.

There are some who would strike the balance differently, but the point here is not the desirability *vel non* of legalized life termination. The point is that this Court is not a "super-legislature," *Griswold*, 381 U.S. at 482, empowered to adjudicate according to the personal preferences or political agendas of its members or any other persons or institutions. Instead, the Court's task is to expound the Constitution. As such, no responsible analysis of the Fourteenth Amendment can include in the right of privacy the practice of suicide or euthanasia by or upon an incompetent through starvation and dehydration. Accordingly, the Missouri Supreme Court has properly recognized that any appropriate change to Missouri's Living Will statute should be made by the Missouri legislature, which is responsible to the citizens of that state.

III. AN INCOMPETENT WARD'S INABILITY TO ASSERT A CONSTITUTIONAL RIGHT DOES NOT *IPSO FACTO* EMPOWER HIS GUARDIAN TO EXERCISE THE WARD'S RIGHT IN HIS STEAD.

A. The Legal Fiction of an Incompetent's "Autonomous" Choice.

In *In Re Quinlan*, 355 A.2d 647 (N.J. 1976), the New Jersey Supreme Court ruled, upon the guardian's petition, that a perpetually comatose ward has a right to privacy sufficiently broad to encompass an individual's choice to remove an artificial life support system. Since the ward could not exercise such a right, "in an analytical leap of great significance" (Beschle, *supra* page 14, at 328), the court reasoned that "the only practical way to prevent destruction of the right is to permit the guardian and family ... to render their best judgment ... as to whether ... [the ward] would exercise it." 355 A.2d at 664. Subsequent right–to–die cases involving incompetents have used similar reasoning.

The petitioners argue, as did the petitioner in *Quinlan*, that any decision which prevents them from removing Nancy's feeding tube effectively deprives Nancy of her constitutional right to refuse treatment. It must remembered, however, that it is Nancy's incompetence, not the actions of the state, that prevent her from asserting her alleged constitutional right. The Constitution does not compel the state to empower the guardian to exercise Nancy's constitutional rights in her stead. Nancy has many constitutional rights which are unexercisable by virtue of her incompetence —- voting, free speech, the right to travel —- nearly all of her rights dealing with social intercourse. No court would entertain the notion that the Constitution empowers Nancy's guardians to cast a ballot on her behalf in addition to their own ballot. Nor would it allow the guardians to seek elected office on Nancy's behalf if the guardians, for some reason, were not qualified to hold the office. Manifestly, to permit a third party to "exercise" an incompetent's Constitutional "rights" is a legal fiction of the highest order. "Absent prior directives, [treatment] decisions are not, properly speaking, rights-based. Nor are they likely to be demonstrably 'right' to objective third parties unconnected to the patient. To someone who lacks intuitive knowledge of the patient, such a subjective test will seldom go further than yielding answers that seem reasonable, or perhaps more reasonable than the alternatives." Rhoden, *supra* page 8, at 303. In fact, "[t]he notion of substituted judgment is logically contradictory. Simply put,

autonomy and self-determination refer to the *individual's* freedom to choose. If a third party, no matter how well-intentioned, makes a choice for that individual, this choice can no longer be called autonomous." Ikuta, *supra* page 10, at 42 (emphasis added).

A guardian's powers are, and should be, derived from and limited by, not the Constitutional rights of the ward, but the laws of the state, *see, e.g., State ex rel. Klopotek v. District Court, Etc.*, 621 P.2d 223 (Wyo. 1980); *Poling v. City Bank and Trust Co. of St. Petersburg, Fla.*, 189 So.2d 176 (Fla. 1966), and should exist only at the state's sufferance. *Quinlan* and its progeny erred by improperly attributing those powers to some constitutional or common law mandate and failing to recognize the temporal source of a guardian's powers. *Cruzan*, 760 S.W.2d at 425.

B. Reasonable Limits on When, and Under What Circumstances, Medical Procedures Can Be Withheld or Withdrawn.

The petitioners argue that Nancy's artificial hydration and nutrition must be discontinued because this would comport with her preference were she able to choose. The thrust of this argument, the so-called "objective evidence test," is that it is the function of the trial court to determine whether she would have done so based on the credibility of witnesses and resolution of conflicts in testimony. It assumes that findings as to what Nancy would have chosen were she competent should not be disturbed unless they lack evidentiary support. This view misapprehends the nature of the Missouri Supreme Court's ruling. That court did not dispute the underlying facts relative to what Nancy said and what kind of person she was. Rather, it ruled that this type of evidence was insufficient, as a matter of law, to support a court order resulting in her certain death.

The rationale for limiting a guardian's right to end a ward's life, and imposing exacting evidentiary requirements for proof of an incompetent's preference for death, are particularly strong. Despite the widespread insistence on describing third party life termination decisions as mere acquiescence to the patient's autonomous choice, these decisions are really a choice made by someone other than the patient. Beschle, *supra* page 14, at 360.

"Irrespective of how it is attempted, making decisions that duplicate what another would have decided is virtually impossible." Alexander, *supra* page 10, at 90.

> The...decision maker, not facing his...own death, but the death of another, will...surely treat death as an objective, distant thing. Yet the decision maker's task is to decide as if he were the patient [for whom]... death is very real and very subjective....[This is true] [e]ven if the... decision maker quite faithfully carries out detailed advance instructions executed by the patient prior to the [onset of the irreversible condition. Such a patient, at the time he created the directive,]... was very much a different person....[One] cannot know, unless the patient [so indicates]..., what [effect] the actual approach of death has [had on] ... his prior choice.

Beschle, *supra* page 14, at 350; *See also* Alexander, *supra* page 10, at 90-91.

If this is indeed the case, how much more difficult must be the determination of the patient's true wishes absent an advance directive? Of particular concern is the sentiment found in various segments of society, including government[20], which "encourage[s] the thought that those who do not want to 'shuffle off' fast enough are somehow failing in their contribution to society" by consuming scarce medical resources. C. Koop & F. Schaeffer, *Whatever Happened to the Human Race* 58 (1983 rev. ed.). Even if some token expression of consent or willingness from the prospective euthanasia target is required as a criterion, such a protective mechanism could easily become ineffectual in a society with proclivities for legal and verbal sleight of hand. Should an incompetent individual find himself in the "care" of a group that embraces strong euthanasia sentiments, these strongly held sentiments could easily

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[20] *See, e.g.*, The Washington Post, June 22, 1977, at A2, col. 1 (Richard Durzon, a high ranking member of HEW suggested conditioning federal medicare funding on states' enactment of a living will statute); and The Washington Post, March 29, 1984, at A3, col. 5 (Richard Lamm, former Governor of Colorado, stated that the elderly and terminally ill "have a duty to die and get out of the way," and compared persons who refuse artificial life support with "leaves falling off a tree and forming humus for the other plants to grow....").

color reality for the caretaker in his or her interpretation of the patient's actions and statements.

Professor Beschle recounts a disturbing example of this phenomenon in the California Court of Appeals's opinion in *Bartling v. Superior Court*, 163 Cal. App 3d 186 (1984). Mr. Bartling died while the case was pending. Bartling was dependant upon a respirator for life support. The hospital opposed Bartling's petition to disconnect the respirator since he had equivocated on numerous occasions. The hospital expressed concern for the sincerity and finality of his decision. The court, in granting Bartling's petition, dismissed as insignificant, "the fact that Mr. Bartling had periodically wavered from his position *because of severe depression....*" *Id.* at 223 (emphasis added). Thus, the California court viewed the "request for euthanasia as automatically the 'true' request and contrary evidence as the result of patholog[ical] [factors]...." Beschle *supra* page 14, at 356 n.151. "Even if the wish to live is influenced by emotion rather than pure reason, why is emotion irrelevant, or worse, a distortion?" *Id.* at 356; *see also* Tribe, *supra* page 17, at 1598-99 (discussing how expanding the right to die might offer a pretext for discrimination against the disabled).

A similar situation occurred recently in New York State. The 88-year old sister of the comatose 86-year old Carrie A. Coons —- who had been definitively declared by her doctors to be in an "irreversible" vegetative state —- had sought approval from New York Supreme Court Justice Joseph Harris to remove the tube that provided nourishment to Mrs. Coons. After approving an order permitting removal of the tube on a Friday, Justice Harris vacated the order the following Tuesday when doctors testified that Mrs. Coons had gained consciousness and, after being informed of her legal plight, "said she would 'like to wait' on any decision about the feeding tube." *See* Verhovek, *New York Judge Revokes Right-to-Die Order as Patient in Coma Wakes*, New York Times, April 12, 1989 (New York City ed.) Dr. Ronald E. Cranford, a Minnesota neurologist and past President of the American Society of Law and Medicine, is quoted as saying "[i]t's a dramatic case —- it shows that you're never dealing with certainties here." *Id.*

In view of this uncertain and perilously precarious situation, it is entirely proper for the Missouri legislature to specify what type of evidence and procedures, if any, will be deemed legally sufficient to determine an incompetent patient's wishes before his guardian is empowered to terminate the life of his or her charge. An executed living will is the most reliable indicator of an incompetent patient's wishes regarding the discontinuance of life support systems. Morgan & Harty-Golder, *supra* note 13, at 756. In the absence of a prior directive, a court has nothing on which to base its judgment as to the patient's preference except the patient's prior casual statements about refusing life support as well as testimony of acquaintances regarding the character of the now incompetent patient. The New Jersey Supreme Court has characterized this type of evidence as inherently unreliable. *See, e.g., In re Jobes*, 529 A.2d 434, 443 (N.J. 1987); *In Re Conroy*, 486 A.2d 1209, 1238 (N.J. 1985). Accordingly, it was proper for the Missouri legislature to exclude such evidence among that deemed legally sufficient to permit the killing of an incompetent patient.

Even with a prior directive, questions must be raised about the significant distinctions between withdrawal of nourishment absolutely essential to human survival as opposed to withdrawal of therapeutic treatment to overcome otherwise harmful or debilitating medical conditions that seriously threaten one's life or bodily functions. Irrespective of whether the Fourteenth Amendment contains a fundamental right to die, it certainly contains a fundamental right to live. No person can be deprived of "life" without due process of law. This right is perhaps the most important since no other right can exist without it. And, as petitioners will readily agree, "the rights of the competent and incompetent are identical." Alexander, *supra* page 10, at 79. No one can determine with certainty how Nancy, or someone in a similar position, would decide. With respect to incompetent adults, any regulatory attempt to protect the one right, places the other at risk.

This Court has permitted, and the courts of this country, have sanctioned —- in the name of Due Process —- seemingly unending judicial review of the convictions of persons convicted of capital offenses and sentenced to death. As a result, it now takes decades and multiple levels of judicial review to carry out society's considered sentence in those cases. And yet, incompetent and comatose persons —- living without advocates and more often than not failing when competent to express their wishes on right-to-die issues —- are given relatively minimal Due Process, if any at all, as their sentences are carried out by "physicians" who know better or by "loving" family members or guardians. This double standard, particularly in cases involving a certain (and cruel)[21] death by withdrawal of food and water, should not be constitutionally sanctioned except in the most compelling circumstances and with the highest level of Due Process. If the word "life" in the Fourteenth Amendment or "cruel and unusual punishment" in the Eighth Amendment are to have any meaning, then it should not vary with the context, nor deny protection of law on an equal basis to all.

The Missouri legislature, as well as the legislatures of 36 other states, *see id.* at 93 n.136, has undertaken, through its Living Will statute, Mo. Ann. Stat. §§ 459.010-459.025 (Vermont Supp. 1987), to determine the relative weight these competing rights should embody in its laws and the presumption the law will favor where uncertainty exists. The living will statute represents a responsible attempt to strike an appropriate balance and allow persons a reasonable opportunity to secure some certainty in the use of medical technology upon their incompetence while minimizing the risk that their life will be terminated by withdrawal of food and water. The Missouri Supreme Court properly decided not to expand Constitutional or common law doctrine to countermand this express legislative policy.

IV. EXPANSION OF THE RIGHT OF PRIVACY TO ENCOMPASS THE REMOVAL OF A NON-TERMINAL INCOMPETENT'S FOOD AND WATER AT THE INSTANCE OF HIS GUARDIAN WILL OPEN THE DOOR TO THE LEGAL EXTERMINATION OF OTHER INCOMPETENTS WHOSE LIVES ARE DEEMED BY THE PREVAILING SOCIAL ETHIC TO BE "DEVOID OF ANY VALUE."

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[21] If there ever were a violation of the Eighth Amendment's proscription against "cruel and unusual punishment," most certainly it would be death inflicted by intentional starvation and thirst.

There is great danger in the situation where private parties can exercise unrestrained power over the life and death of others and maintain that they are merely vindicating the rights of the persons being harmed. History reminds us of the abuses of Eastern European nations perpetrated in the name of "workers' rights." Sadly, this Court has not been immune to the use of such rhetoric. In *Lochner v. New York*, 198 U.S.45 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the Court invalidated legislative efforts to protect laborers from economic exploitation. The Court described its action as a vindication of the right of the worker to contract freely with respect to terms of employment. *Adkins*, 261 U. S. at 545. Through the use of such a rhetorical mechanism, "the courts, and society..., could rest easy, assured that they were not responsible for the exploitation of labor. They had merely deferred to the rights of the worker to make his own contracts. How they used their rights might be unfortunate, but it was not society's fault." Beschle, *supra* page 14, at 348.

Similarly, this Court is now asked to lend its power to order Nancy Cruzan's physician to terminate her life so that her "right to die" might be vindicated. As observed by one critic of substituted judgment, "[i]n these efforts to avoid responsibility for the exercise of power, the concept of a right can be of great value." Beschle, *supra* page 14, at 347.

It is not infrequent that the vilest of sentiments come packaged as a humanitarian gesture and carry the language of compassion. History again reminds us of the slave owner who justified slavery on the grounds that his Black slave would be thankful for the benefit of sharing in the "White man's" culture. Through similar rhetoric, the early colonists justified their oppression of the Indian. The Nazi's pursued their "final solution" of eliminating life "not worthy of life" for what they viewed to be the greater good of Aryan society. This "final solution" included not only the Jews, but also the handicapped, the infirm and the elderly.

The common thread these examples from human history share with the case at bar is the institutional complicity of closed eyes to the humanity of those individuals who are chiefly affected by these policies. Rhetorical devises and fictions are enlisted to

facilitate this process. The slave becomes "property", the unborn child, "tissue," and the Jew, "vermin". In this case, the person in a persistent vegetative state are denominated "PVS patients" and suggested to be lacking attributes of meaningful "humanity."[22] Former Surgeon General C. Everett Koop first warned in 1979, perhaps prophetically, that the next candidates for arbitrary reclassification as non-persons in our society are the elderly (C. Koop & F. Schaeffer, *Whatever Happened to the Human Race* 54 (1983 rev. ed.) to be followed by "individuals or groups of individuals who are unwanted, imperfect, or socially embarrassing." *Id.* at 56.

One researcher, in discussing a society's widespread use of dehumanizing metaphors to describe certain human groups immediately prior to the genocidal massacre of those groups (*see* L. Kuper, *Genocide* 84-100 (1981)), noted that the inhibitions against killing one's own kind "are generally so strong that the victims must first be deprived of their human status if systematic killing is to proceed...[Once] dehumanized, principles of morality no longer apply to them and moral restraints against killing are more readily overcome." *Id.* at 87. Need one ponder long to discern the purpose of the term "irreversibly vegetative" as applied to condition of a Nancy Cruzan or Carrie Coons?

Lest this appear as alarmism, it has been seriously suggested by Dr. Ronald E. Cranford, in a recent issue in the American Journal of Law and Medicine dedicated to a sitting Justice of this Court, that human personhood, and the rights that follow under the Fourteenth Amendment, should be based solely on one's state

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[22] *See*, Brief *Amicus Curiae* of the American Academy of Neurology in Support of Petitioners in this case, p. 2 ff. The Brief implies that "PVS patients" are "subhuman:"

> Where a patient retains any attribute of humanity, including any degree of consciousness or sentience, the state might reasonably assert an interest in protecting that attribute. But the state cannot reasonably assert a compelling interest in maintaining life that exists on a purely vegetative level —- the only level on which a PVS patient exists.

Id. at 22. The clinical uncertainties of the persistent vegetative state, however, bring this analysis into serious question. *See* text at p. 23 of this Brief.

of "consciousness." Writing with David Randolph Smith, a lawyer, Dr. Cranford states:

> Our major premise is that consciousness is the most critical moral, legal, and constitutional standard, not for human life itself, but for human personhood....Thus, we believe that the permanent loss of all consciousness is just as significant as the loss of all cardiopulmonary functions (the cardiopulmonary standard for death), and all brain functions (the neurological standard for death), in determining the moral and legal status of a human being.[23]

These gentlemen go on to point out that the annual cost of maintaining persistent vegetative state patients in the United states is between $120 million to $1.2 billion. They ask: "Why should society spend this much money for patients who can never benefit from continued treatment in any way, when 37 million people with no medical insurance or coverage have such a reduced opportunity for even a minimal level of health care? Is this social justice?" *Id.* at 246.[24] Of course, whether it is just depends on the standard of justice to be administered. Here, it is necessary for them to define away "life" in the Fourteenth Amendment in order to remove human beings from the protection of its guarantees.[25]

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[23] Cranford and Smith, *Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood*, in *Justice Harry A. Blackmun: The Supreme Court and the Limits of Medical Privacy*, 13 Am. J. L. & Med. 233-234, 244 (1987). Cranford would also apply the "consciousness" standard, rather than the "viability" standard, to abortion. *Id.* at 239.

[24] Notably, these gentlemen oppose "deregulation" or "right-to-die" decisions to permit family members to exercise the decision. They point out the "potential conflict of interest that family members might have in bringing about death to effectuate inheritance, insurance proceedings, remarriage without a divorce or other ulterior benefits." *Id.* at 245. *See also*, in this regard, Ikuta, *supra* page 10, at 63.

[25] In a related field, Dr. Robert D. Truog and bioethicist Joseph C. Fletcher in a recent issue of the New England Journal of Medicine argue that doctors should be allowed to ignore the usual standards of brain death for anencephalic infants so that their organs can be harvested for use by other sick babies. "Our proposal asserts that the anencephalic infant is not alive." *Doctors advise exception to brain death policy*, The Kansas City Star, August 10, 1989, p. 2A, col. 1. Two other physicians argue in the same Journal that anencephalic infants are alive "and the length of their lives cannot be predicted accurately." *Id.* "They cautioned that making an exception for anencephalic infants might eventually lead to tkaing organs from people with other profound medical conditions, such as other babies with severe head malformations or adults in persistent vegetative states." *Id.*

Attempts by the medical community to exempt themselves from legal sanctions for their actions is not new. Witness the enormous investment of time and money by the national medical associations to hire the largest law firms and preeminent attorneys to file *amicus* briefs in this case and in other recent cases before this Court with regulatory or financial implications for the medical profession.[26] Dr. Koop has reminded us of the extensive influence of the medical profession in the development and execution of the Nazi regime of euthanasia against the weak and infirm. *Id.* at 65.

> The guiding philosophic principle of recent dictatorships, including the Nazis, was Hegelian in that what was considered "rational utility" and corresponding doctrine and planning had replaced moral, ethical and religious values. Medical science in Nazi Germany collaborated with this Hegelian trend particularly in the following enterprises: the mass extermination of the chronically sick in the interest of saving "useless" expenses to the community as a whole; the mass extermination of those considered socially disturbing or racially and ideologically unwanted; the individual, inconspicuous extermination of those considered disloyal to the ruling group; and the ruthless use of "human experimental material" in medical military research. Remember, physicians took part in this planning.[27]

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[26] *See* briefs *amicus curiae* of the various medical organizations in *Bowen* v. *American Hospital Association*, 476 U. S. 610 (1986); *City of Akron* v. *Akron Center for Reproductive Health*, 462 U. S. 416 (1983); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986); *Webster* v. *Reproductive Health Center*, _U. S._, 109 S.Ct. 3040 (1989).

[27] Koop, *The Slide to Auschwitz*, in R. Reagan, *Abortion and the Conscience of the Nation*, 61-62 (1984).

"The work that provided the rationale for Nazi euthanasia, *The Permission to Destroy Life Unworthy of Life*, was written by two distinguished German professors, a professor of law and a professor of psychiatry." Ikuta, *supra* page 10, at 62.

Dr. Leo Alexander, a psychiatrist enlisted as a consultant for the Chief of Counsel for War Crimes at Nuremberg, in a widely quoted article written at the end of World War II, concluded that "it all started with the acceptance of the *attitude*, basic to the euthanasia movement, that there is such a thing as a life not worthy to be lived....The infinitely small wedged in lever from which all this entire trend of mind received its impetus was the [society's] attitude towards the non-rehabilitable [sic] sick." Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39 (1949). It is this same attitude, that some life is not worth living, and therefore not worth protecting, that underpins the arguments advanced by prominent lawyers and medical professionals in support of the petitioners. *Amici Curiae* urge this Court to reject this sentiment and affirm the value and dignity of all human life, both young and old, infirm and whole, and to uphold State regulation that is protective of the right to life rooted not only in the Fifth and Fourteenth Amendments to the United States Constitution, but in the principal declarative document of our society, the Declaration of Independence.

CONCLUSION

For the compelling reasons stated above, the judgment of the Missouri Supreme Court should be forcefully affirmed.

Respectfully submitted,

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